Supreme Court, U.S.
FILED

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No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF MISSOURI,
Petitioner,

vs.

EMORY M. FUTO
Respondent.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Whether a criminal defendant who is not precluded from consulting with his attorney on any other matter relating to his trial and defense must also be allowed, under the Sixth and Fourteenth Amendments, to craft his own testimony by discussing it with his attorney during an overnight recess in his cross-examination.

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No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF MISSOURI,
Petitioner,

vs.

EMORY M. FUTO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Opinion Below

The opinion of the Missouri Court of Appeals, Eastern District, reversing respondent's convictions is reported at 932 S.W.2d 808 (Mo. Ct. App., E.D. 1996), and is published in the Appendix at A-4. The mandate of the Court of Appeals ordering the cause to be remanded to the trial court for a new trial is included in the Appendix at A-1.

Jurisdictional Statement

The Missouri Court of Appeals, Eastern District, reissued its opinion on November 27, 1996, after the case was retransferred to it by the Missouri Supreme Court (A-4). Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.01, this petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law . . . .

Statement of the Case

A jury found that the respondent, Emory M. Futo, was guilty of four counts of murder in the first degree, §565.020, RSMo 1994. Futo was sentenced to four consecutive sentences of life in prison without eligibility for probation or parole for the murders of his father, mother, and two brothers. The circumstances of Futo's offenses were summarized in the opinion of the Missouri Court of Appeals, Eastern District. *State v. Futo*, 932 S.W. 2d 808, 811-812 (Mo. Ct. App., E.D. 1996) (A-4 to A-9).

The Court of Appeals reversed Futo's convictions and sentences based on his claim that the government interfered with his right to effective assistance of counsel. The event on which he relies occurred at the end of a trial day, while Futo's cross-examination was still underway. Throughout the trial, the court had imposed the usual rule precluding witnesses from conferring with counsel during recesses prior to or during the course of cross-examination. At the end of the trial day in which Futo took the witness stand, his counsel asked whether the court would maintain consistency by precluding Futo from discussing his testimony with his attorney before his cross-examination by the state continued the next morning. *Id.* at 812-815; (A-9 to A-10). The defense counsel's invitation and the court's acceptance of it are reflected in the following discussion, which occurred on the record but out of the hearing of the jury:

> [DEFENSE COUNSEL]: I'll sum it up, you tell me when I'm wrong. I have briefly off the record indicated to the Court, the Court has had admonitions to counsel for the State, and I assume their investigators as well, concerning discussions with witnesses about their testimony and about any other

testimony that may have occurred before or after. I had asked the Court whether or not the similar admonition applied between me and the defendant, the Court indicated that there was and that I would be ordered not to discuss with him the nature of his testimony or anything else concerning his testimony and I indicated to the Court I would abide with that ruling. I wanted to put on the record that I have concerns and I object to the ruling based on the Sixth Amendment privileges the defendant has to consult with counsel and communicate with counsel.

THE COURT: Do you want to make a comment about that?

[THE PROSECUTOR]: Judge, I believe that once they get on the witness stand he has to be treated as if he never gets off until it's completed, so, I don't know.

THE COURT: I agree.

[THE PROSECUTOR]: I don't think that the Sixth Amendment right to counsel is violated in any way because once he starts to testify, he is up there until he gets done. So, I don't believe it does violate anything.

THE COURT: I agree with the State's position. I'll direct counsel, just like I've directed other counsel, not to discuss the testimony with your client.

(A-38 to A-39). Later, Futo's counsel said that he was complying with the trial court's ruling, but that he believed that its ruling interfered with Futo's right to counsel (A-39 to A-40). The trial court stated that it was sticking with its prior ruling and that it had been telling all witnesses, including the defendant, not to discuss their testimony with anyone during recesses (A-40).

Futo's claim concerning the denial of his right to effective assistance of counsel was preserved for appeal by being raised at trial and in the motion for a new trial (A-38 to A-41).

The Missouri Court of Appeals, Eastern District, accepted Futo's claim that the state had violated his right to effective assistance of counsel, and reversed his convictions on March 26, 1996. *Id.* at 808 (A-4). Petitioner asked the Court of Appeals to rehear the appeal or to transfer the case to the Missouri Supreme Court; that request that was denied on May 6, 1996. (A-36). Petitioner then filed with the Missouri Supreme Court a motion for transfer (A-33). That motion was granted on June 25, 1996 (A-33). On November 19, 1996, the Missouri Supreme Court retransferred this case to the Court of Appeals (A-32). On November 27, 1996, the Court of Appeals reinstated its previous opinion (A-3). The Court of Appeals' December 2, 1996, mandate remanded the case to the trial court for a new trial (A-1).

Reasons for Granting the Writ

This Court should grant the petition for a writ of certiorari for two reasons.

First, the Missouri Court of Appeals has decided an important question of federal law that has not been but should be decided by this Court. This Court has previously addressed related questions regarding the right of a criminal defendant to confer with counsel to assist his defense during recesses in the trial. But the holdings in the principal cases deal solely with the effect of varying durations of recesses. This Court has not addressed an instance -- regardless of the *length* of the recess -- where the trial court permitted the defendant and his counsel, during a recess in the midst of cross-examination, to address the entire range of tactical, strategic, and evidentiary issues, excepting only the defendant's own testimony. The Court of Appeals concluded that during an overnight recess, criminal defendants must not only be allowed to confer with counsel on issues of strategy, tactics, and evidence generally, but also on the specifics of the defendants' own testimony -- a conclusion that opens, without support from this Court's prior opinions, a door to abuse, and that deserves the attention of this Court.

Second, Missouri Court of Appeals has decided an important federal question in a way that conflicts with the decision of courts in other states. The Missouri court followed precedents from the District of Columbia and Fourth Circuits, and from New Jersey. But contrary rulings have been handed down in Maryland, Delaware, and New York. Those trying criminal cases in the remaining eight regional federal circuits and in the remaining forty-five states deserve the kind of clarity that only this Court can give in defining the constitutional rights of criminal defendants.

1. The opinion of the court below creates a significant new constitutional principle -- one that is not supported by either *Geders v. United States* or *Perry v. Leeke*, that is easily subject to abuse, and that will interfere with the search for truth.

The question here is a basic one, dealing with an important aspect of a criminal defendant's rights during trial. And the question "is not only important, but also one that frequently arises." *Perry v. Leeke*, 488 U.S. 272, 277 (1989). In *Perry*, this Court held that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. But in this case, the court of appeals has held that in the instance of an overnight recess in the midst of cross-examination, a criminal defendant has an unfettered right to have his counsel help craft the defendant's answers. That rule falls outside the scope of the issue addressed in the holdings of this Court in *Perry* and *Geders v. United States*, 425 U.S. 80 (1976). But it is of equal importance.

The basic rule applied by the trial court was hardly novel. Nor was its application to a criminal defendant, for when a defendant "assumes the role of witness, the rules that generally apply to other witnesses -- rules that serve the truth-seeking function of the trial -- are generally applicable to him as well." *Perry*, 488 U.S. at 282. Thus the court of appeals was not without precedents to cite. And it relied on two both *Geders* and *Perry*. *State v. Futo*, 932 S.W. 2d at 813-815 (A-11 to A-16).

Geders and *Perry*, like this case, both involved communications with counsel. In each case a criminal defendant was on the witness stand being cross-examined at the time of the recess. And in each case the trial court

restricted the defendant's ability to communicate with counsel during a recess -- all like what happened to Futo. But both *Geders* and *Perry* dealt only with bans on *all* consultation between criminal defendants and their lawyers. In neither case was this Court faced with defendants' alleged right, during a recess in the state's cross-examination of the defendant, to discuss that very testimony. Thus, although the line between *Perry* (in which a restriction was permitted) and *Geders* (in which it was not) "is a thin one," *Perry*, 488 U.S. at 686, this case does not fall along that line.

In *Geders*, this Court heard a case in which the trial judge had decided that it was "better that [the defendant] not talk to [his counsel] about anything" during an overnight recess. 425 U.S. at 82. This Court held that the trial judge had gone too far. Although communications between counsel and nonparty witnesses could be banned, the Court observed that there was a difference between such witnesses and criminal defendants: "A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during trial." *Id.* at 88. The subject of the consultation was unimportant in *Geders*, for the trial court precluded consultation regardless of the topic.

This Court addressed a similarly broad ban on consultation in *Perry v. Leeke*. Again, the defendant was precluded from talking "to anyone, including his lawyer," during a fifteen minute break in his testimony. 488 U.S. at 274. The difference between *Perry* and *Geders* was not the extent of the consultation bar, but only its duration. This Court recognized that when the trial court imposes a complete ban on communication between defendant and counsel, the line between a fifteen minute and an overnight recess is "a line of constitutional dimension." *Perry*, 488 at 280. Thus the Court upheld the conviction in *Perry*, recognizing that by

precluding a defendant from any consultation with his attorney whatsoever for fifteen minutes the government did not unconstitutionally interfere with the defendant's right to conduct his defense.

Implicit in both *Perry* and *Geders* is a recognition (a) that criminal defendants, by choosing to take the stand, are subject to restrictions on their ability to have counsel color their testimony on cross-examination, and (b) that criminal defendants are subject to different rules than are nonparty witnesses when it comes to discussion of trial strategy and tactics and to providing information to counsel that is necessary "to make independent decisions about how to conduct the defense" of the case. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), *quoted with approval*, *Perry*, 488 U.S. at 281. But although this case may be decided based on the same concerns that were at issue in the divergent opinions in *Perry* and *Geders*, it is not ruled by either holding. Again, this case addresses the distinct issue of the scope, not the duration of the trial court's order restricting communications during cross-examination.

This issue is important because the context in which it arises, cross-examination, is so critical to our judicial system. Thus in *Perry* this Court emphasized that "[t]he importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct, . . . suggests that the right to assistance of counsel did not include the right to have counsel's advise on cross-examination." 488 U.S. at 283 n.7. This Court further explained the rationale for the "common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed":

Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves truthful statements based on their own recollections. The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration. Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses--rules that serve the truth-seeking function of the trial--are generally applicable to him as well.

* * *

[I]t is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney. "Once a defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *United States v. DiLapi*, 651 F.2d 140, 151 (CA3 1981) (Mishler, J., concurring), *cert. denied* 455 U.S. 938 (1982).

Perry, 488 U.S. at 282-283. How the question posed by this case is answered will directly affect the success of our quest for "uninfluenced testimony on cross-examination." Although *Geders* and *Perry* addressed a critical issue in defining the parameters of that quest, neither case answered this new and important question.

The Court also recognized in *Perry* that a showing of prejudice is not required when a Sixth Amendment claim of governmental interference with the right to counsel is raised. 488 U.S. at 280. Since prejudice is not a factor, it does not matter how long the recesses in a defendant's testimony last if the defendant is merely precluded from discussing his testimony with his counsel during those recesses. The only reason that this Court discussed the length of the recess in *Perry* was that it decided that the *blanket ban* on discussion did not warrant the reversal of the defendant's conviction in that case, because the short length of time involved in the recess in that case made it virtually certain that any discussion between the defendant and his attorney would have related to the ongoing testimony, and the defendant did not have a right to discuss that testimony while it was in progress. 488 U.S. at 283-284.

However, the issue of whether a criminal defendant has the right to discuss *his testimony* with his counsel during long recesses in his testimony (those longer than fifteen minutes) has never been directly addressed by this Court. That question, like the related ones addressed in *Geders* and *Perry*, arises frequently -- certainly any time that a cross-examination extends beyond a single trial day, and probably when it extends past the lunch hour. The issue will arise more frequently if the court of appeals decision stands, for defense counsel will learn to take advantage of the court's new rule by manipulating schedules and length of direct examination to increase the likelihood of an lengthy recesses.

Without a resolution of the question by this Court, trial judges are unable to manage their courtrooms and prosecutors are unable to use the tool of cross-examination in a manner that best tests the truth of the testimony offered by criminal defendants.

(2) The opinion of the court below conflicts with the decisions of courts in other states.

Appellate courts across the United States have faced fact patterns like those presented here -- and have reached conflicting results.

Some appellate courts have approved of orders preventing defendants from discussing their testimony with their counsel during long recesses in their testimony, including overnight recesses. Those courts have decided, like this Court did in *Perry*, that defendants do not have the right to discuss their testimony with their counsel during breaks in that testimony. *Perry*, 488 U.S. at 281-282; *Wooten-Bey v. State*, 568 A.2d 16 (Md. 1990); *Bailey v. State*, 422 A.2d 956, 957-963 (Del. 1980); *People v. Enrique*, 165 A.D. 2d 13, 18-20 (N.Y. Sup. Ct. 1991), *affirmed* 600 N.E. 2d 229 (N.Y. 1992); *People v. Foust*, 192 A.D.2d 718 (N.Y. Sup. Ct. 1993); *Snyder v. State*, 657 A.2d 342, 356-357 (Md. Ct. App. 1995). In *Webb v. State*, 663 A.2d 452 (Del. 1995), the court emphasized that "[t]he fortuitous intervention of an overnight recess during cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur." *Id.* at 460 (emphasis added).

But other courts -- like the court of appeals in this case -- have reversed convictions when trial judges refused to allow such "occasions for coaching." *E.g.*, *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, *Hatcher v. United States*, 498 U.S. 1049 (1992); *State v. Fusco*, 461

A.2d 1169 (N.J. 1983); *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986). Missouri, by following that line, has exacerbated the conflict.

Nothing in modern trial procedure will reduce or eliminate the number of times a prosecutor must resume cross-examination of a criminal defendant after a lunch hour or the next morning. Thus, the situation that Futo's counsel provoked will occur again and again, and court after court will have to choose between the conflicting lines of authority. The differences of opinion among courts that must ensure the integrity of testimony while attempting to prevent constitutional error will continue to arise so long as the courts lack guidance from this Court as to how to adapt the *Geders* and *Perry* holdings to issues of scope rather than duration.

Conclusion

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the Missouri Court of Appeals, Eastern District.

Respectfully submitted,

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(2) No. 96-1259 FEB 10 1997

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October Term, 1996

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vs.

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On Petition for Writ of Certiorari to the
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October Term, 1996

THE STATE OF MISSOURI,	)	
Petitioner,	)	
vs.	)	
	)	No. 96-_____
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Respondent.	)	

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8. Relevant portion of motion for a new trial . . A-41

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
MANDATE

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	No. 63922
	)	
vs.	)	Appeal from the Circuit
	)	Court of the City of St.
EMORY M. FUTO,	)	Louis, No. 911-2489,
	)	Division 5
Defendant-Appellant.	)	

EMORY M. FUTO,	)	No. 67201
	)	
Movant-Appellant,	)	Appeal from the Circuit
	)	Court of the City of St.
vs.	)	Louis, PCR No. 3096,
	)	Division 7
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

The Court, being sufficiently advised of and having considered the premises, adjudges that the judgment rendered by the City of St. Louis Circuit Court in cause No. 911-2489 be reversed and the cause remanded to the trial court for a new trial in accordance with this Court's opinion delivered March 26, 1996.

STATE OF MISSOURI, ss.

I, DEIRDRE O'MEARA SMITH, Clerk of the Missouri Court of Appeals, Eastern District, certify that the above and foregoing is a full, true and complete transcript of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis this 2nd day of December 19 96.

_____

Clerk, Missouri Court of Appeals,
Eastern District

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	Nos. 63922 & 67201
	)	
vs.	)	
	)	
EMORY M. FUTO,	)	
	)	
Appellant.	)	

ORDER

On March 26, 1996, this Court handed down an opinion reversing the judgment of the Circuit Court of the City of St. Louis and remanding the cause for a new trial. On May 6, 1996, this Court denied appellant's motion for rehearing and application for transfer. On July 25, 1996, the Supreme Court granted appellant's application for transfer. On November 19, 1996, the Supreme Court ordered this cause retransferred to this Court.

Being duly advised in the premises, the opinion of March 26, 1996 is readopted as the opinion of this Court. The Clerk is directed to issue the mandate forthwith.

DATE: 11-27-96

CLIFFORD H. AHRENS
Chief Judge

cc: Nancy Vincent
Breck Burgess
West Publishing Company

State of Missouri, Plaintiff/Respondent,
v.
Emory M. FUTO, Defendant/Appellant.
Emory M. FUTO, Movant/Appellant,
v.
State of Missouri, Respondent/Respondent.
Nos. 63922, 67201.
Missouri Court of Appeals,
Eastern District,
Division Four.
March 26, 1996.
Motion for Rehearing and/or Transfer to
Supreme Court Denied May 6, 1996.
Case Transferred to Supreme Court
June 25, 1996.
Case Retransferred to Court of
Appeals Nov. 19, 1996.
Original Opinion Reinstated
Nov. 27, 1996.

A jury convicted defendant of four counts of first degree murder under §565.020, RSMo 1986. The trial court sentenced him to four consecutive life terms without possibility of probation or parole. Defendant appeals.[1]

He raises eleven points. His first is dispositive. In that point, he alleges the trial court erred in directing defense counsel not to discuss defendant's testimony with him during

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[1]Defendant filed a Rule 29.15 motion which the motion court denied. He appealed that ruling, however, his brief does not contain any points related to that ruling. Thus, defendant abandoned that appeal. Moreover, in view of our ruling on his direct appeal, any post conviction issues would be moot.

numerous recesses while defendant testified, including two overnight.[2]

This restriction violated defendant's Sixth Amendment right to counsel. See Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) and Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). Therefore, we reverse and remand. Our discussion of other points is limited to those which may arise at retrial.

I. BACKGROUND

A grand jury indicted defendant for the July 26, 1991 murders of his mother, father, and two brothers, Joe and Nick. At the time of the killings, defendant lived with his wife and son in Riverside, California.

In late May or early June, 1991, defendant asked a neighbor about getting an unregistered .38 caliber pistol. The neighbor did not have one like that for sale. About two weeks later, they again discussed it. Subsequently, in late June, defendant told neighbor, "[D]on't worry about it, it's been taken care of."

On July 20, 1991, defendant's brother, Nick, told his girlfriend he received parts of a gun in a package defendant sent. Nick said defendant was coming into town for a $200,000 drug deal. Nick said defendant wanted Nick to pick him up at the airport, drive him where he needed to go, and drop him at the airport when it was over. Nick told girlfriend the drug deal was not his idea and that the gun was for any trouble which might occur.

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[2]Voir dire examination began on February 1, 1993. The jury returned its verdicts on March 12. The transcript furnished us contains 9,949 pages; the legal file 885 pages.

On July 22, defendant used an assumed name, Jim Clayton, to purchase round-trip airline tickets from California to St. Louis. The tickets showed a 10 a.m. departure on July 25, indicating an afternoon arrival in St. Louis. The tickets also provided defendant was to leave St. Louis at 6:40 a.m. on July 26. Airline records reflect that the tickets were used as purchased.

Defendant convinced a friend to drive him to the airport. He told his friend he did not want his wife to know that he was going to St. Louis. They told their wives they were going camping. Friend took defendant to the airport on July 25, stayed away from home that day and night, and picked up defendant at the airport the next day.

Defendant's brother Nick worked at his regular job in St. Louis on July 25. Late that afternoon, he gave money to a co-worker to purchase a pillow and a mallet. When he left the store about 5:30, girlfriend saw Nick with the mallet and pillow. When she asked about them, Nick told her that defendant asked him to pick them up for him.

Around 8 that evening, Nick called girlfriend. She asked, "[A]re you guys done yet?" Nick replied, "No, we're not done yet, we haven't done it." Nick said he would call her again around midnight. She never heard from him again.

At approximately 9 that evening, residents of an apartment complex heard gunshots coming from the area of a nearby cemetery. Within a short while, a car similar to the one Nick owned pulled into the apartment parking lot. Defendant was alone in the driver's seat of the car. He was looking in the direction of where the shooting took place. Late the next afternoon, Nick's body was found in woods at the back of the cemetery. He had been shot four times with a .38 caliber pistol. A new pillow similar to the one Nick

bought the day before was found in a nearby cemetery dump. The pillow appeared to have blood on it.

Between 9:30 and 11:00 the evening of July 25, defendant was seen sitting in a car similar to Nick's. He was alone in the car and was fumbling with some papers.

Defendant's father worked at Anheuser Busch. On July 25, he worked until twelve midnight.

Later the same night at 2:47 a.m., actually the early morning hours of July 26, a cab company received a request for a cab. The caller gave his name as Jim, the same name defendant used to purchase the airline tickets. He asked to be picked up at a restaurant and taken to the airport.

The cab driver picked up defendant. At defendant's request, the driver took him to a restaurant near the airport. Defendant ate some food and was there about 20 to 25 minutes. Between 3:30 and 4:00 a.m., defendant walked over to the airport. After walking around in the airport, he caught his flight back to California.

Around 4:30 that afternoon, relatives and the police went to father and mother's home. When the police entered the home, they found mother's body in a hallway, partially inside a bedroom. Blunt trauma to the head caused her death. A mallet such as the one Nick purchased for defendant would be consistent with the type of object used to cause mother's injuries and death.

Father was found in the basement. His body had four stab wounds and three gunshot wounds. The same gun used to shoot Nick was used to shoot father.

Defendant's other brother, Joe, was found dead around 6:00 p.m. the same day. His body was in the back seat of his car, covered with trash bags. The car was parked about a block from father and mother's house. Joe was shot three times with the same gun used to kill Nick and father.

Around 4:30 a.m. the next day, July 27, the police found Nick's car. It was parked in a private business area, within walking distance of the restaurant where a cab had picked up defendant.

Later that same day, California law enforcement officers talked with defendant at his home. He told them he had been camping all week and had not "been back in St. Louis in over a year."

The following day, July 28, Missouri law enforcement officers flew to California. They spoke with defendant. He told them he had lied to the other officers, that he had been in St. Louis on July 25. He acknowledged that Nick picked him up at the airport.

Among other things, he said he went to St. Louis to help Nick with a drug deal. Later, he said he and Nick went to his parents' home, where Nick killed their mother. They then met up with Joe and told him what had happened. Joe panicked and Nick shot and killed him.

Defendant said he and Nick then returned to his parents' home and waited for their father. When father arrived, Nick shot and killed him. They then went to the cemetery. They had a pact: Defendant was to kill Nick and then commit suicide. He admitted killing Nick, but could not kill himself. He then abandoned the car, went to the restaurant, called a cab, and ultimately went to the airport and flew home.

Defendant presented evidence, including his own testimony.

II. RESTRICTIONS ON ATTORNEY-CLIENT COMMUNICATIONS

In his first point, defendant claims the trial court erred when it refused to allow him to consult with his attorney on matters relating to his testimony during several extended recesses while defendant testified.

Defendant began giving his testimony on March 1. Immediately before a lunch recess at 12:30 p.m., a discussion was held off the record. Then the following exchange occurred:

> DEFENSE COUNSEL: I'll sum it up, you tell me when I'm wrong. I have briefly off the record indicated to the Court, the Court has had admonitions to counsel for the State, and I assume their investigators as well, concerning discussions with witnesses about their testimony and about any other testimony that may have occurred before or after. I had asked the Court whether or not the similar admonition applied between me and the defendant, the Court indicated that . . . I would be ordered not to discuss with him the nature of his testimony or anything else concerning his testimony and I indicated to the Court I would abide with that ruling. I wanted to put on the record that I have concerns and I object to the ruling based on the Sixth Amendment privileges the defendant has to consult with counsel and communicate with counsel.

THE COURT: Do you want to make a comment about that?

CIRCUIT ATTORNEY: Judge, I believe that once they get on the witness stand he has to be treated as if he never gets off until it's completed, so, I don't know.

THE COURT: I agree.

CIRCUIT ATTORNEY: I don't think that . . . the Sixth Amendment right to counsel is violated in any way because once he starts to testify, he is up there until he gets done. So, I don't believe it does violated anything.

THE COURT: I agree with the State's position. I'll direct counsel, just like I've directed other counsel, not to discuss the testimony with your client.

The trial court resumed at 1:45 p.m. Defendant returned to the stand and his direct examination continued until approximately 4:30. At that time, cross examination began. Shortly before 5:30, the trial court recessed for the day. At that time, this exchange occurred:

DEFENSE COUNSEL: The only thing is I wanted to make a record of the fact that I am relatively convinced the Court will give me the same admonition now as he gave me at the lunch time and I will -- I will follow that admonition although I do believe that it does interfere with his Sixth Amendment and Missouri Constitutional amendments to a lawyer, but I will not have any conversation with him and I will direct all of my staff not to have any conversation with him under the Court's ruling.

THE COURT: All right. And that's the same ruling and I have been telling witnesses, including the defendant, don't discuss your testimony with anybody.

Cross examination of defendant resumed the next morning, March 2. It continued until about 5:00. Re-direct examination began and continued until the court recessed at 5:45.

The next morning, March 3, re-direct examination lasted about an hour. Defendant's testimony finally concluded before the noon recess.

Six additional recesses occurred during defendant's testimony, each apparently of relatively short duration. No objections were raised and no instructions were given at these later times. No suggestion is made, nor was any evidence presented, that defendant and his counsel had any out-of-court contact from the morning of March 1 until noon on March 3.

In the last twenty years, the United States Supreme Court has addressed this issue twice. Geders v. United States is a 1976 decision. There, direct examination of the defendant concluded at 4:55 p.m. Cross examination was to begin the next morning. The government's counsel asked the trial court if the defendant had been instructed not to talk to anyone about the case. An extensive colloquy took place. Geders, 425 U.S. at 82-83, 96 S.Ct. at 1332-33, 47 L.Ed.2d at 596-97.

In that colloquy, the trial court, apparently directing its remarks to defense counsel, said it thought it was better that defendant not to talk to defense counsel "about anything." Subsequently, the trial court, speaking to defendant, directed defendant not to discuss his "testimony in this case with anyone until you are back here tomorrow

morning." Id. Defense counsel objected. However, the trial court overruled the objection.

The Supreme Court recognized a conflict existed "between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching.'" Geders, 425 U.S. at 91, 96 S.Ct. at 1337, 47 L.Ed.2d at 601. That "conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." Id.

The Court held that the order preventing defendant from consulting his counsel "about anything" during the overnight recess impinged upon his Sixth Amendment rights. It therefore reversed and remanded. Id.

The Supreme Court next addressed this issue in Perry v. Leeke, a 1989 decision. In Perry, the defendant testified. At the conclusion of his direct examination, the trial court declared a 15-minute recess. The trial court directed the defendant not to talk to anyone, including his lawyer, during the break. Perry, 488 U.S. at 274, 109 S.Ct. at 596, 102 L.Ed.2d at 629. When the trial resumed, defense counsel moved for a mistrial, which the trial court denied. Id.

On appeal, the defendant relied on Geders. The Supreme Court acknowledged that the line between the facts in Geders and the facts before it was "a thin one." Perry, 488 U.S. at 280, 109 S.Ct. at 600, 102 L.Ed.2d at 633. However, it distinguished Geders, holding that the trial court has the power to maintain the status quo during a "brief recess," a "short recess," or one for "a few minutes." Perry, 488 U.S. at 283-85, 109 S.Ct. at 601-02, 102 L.Ed.2d at 635-36.

However, the Supreme Court acknowledged that different concerns must be considered during an overnight recess. It recognized that during such a recess, a defendant has a constitutional right to consult with his attorney. "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." Perry, 488 U.S. at 284, 109 S.Ct. at 602, 102 L.Ed.2d at 635-36 (citation omitted).

In addition, Perry held, "a showing of prejudice is not an essential component" of a Sixth Amendment violation in this type of claim. Perry, 488 U.S. at 278, 109 S.Ct. at 599, 102 L.Ed.2d at 632. The Supreme Court specifically rejected the Court of Appeals rationale that the error was harmless under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Perry, 488 U.S. at 276-80, 109 S.Ct. at 597-600, 102 L.Ed.2d at 630-33. See also State v. Baldridge, 857 S.W.2d 242, 252 (Mo.App., W.D. 1993) ("Defendant correctly points out that she is not required to demonstrate prejudice to prevail.")

The facts before us firmly place this case within the scope of the rule in Geders. Here, the trial court directed defense counsel "not to discuss the testimony with [defendant]" and told defendant, "don't discuss your testimony with anybody." These directions applied during numerous recesses, including two overnight. The period of time involved here is at least twice that in Geders.

Nevertheless, the State makes two arguments. First, relying on language in Perry, it contends that when a defendant becomes a witness, a defendant has no

constitutional right to consult with his attorney while he is testifying.

The context of that statement is apparent from the sentence immediately following that on which the State relies. It states, "[A defendant] has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." Perry, 488 U.S. at 281, 109 S.Ct. at 600, 102 L.Ed.2d at 634. What Perry does is extend the trial court's right to prevent consultations during a "brief recess," a "short recess," or one for "a few minutes."

Furthermore, as indicated above; Perry holds that during an overnight recess, a defendant does have the constitutional right to talk with is attorney. That those discussions will include "defendant's ongoing testimony does not compromise that right." Perry, 488 U.S. at 284, 109 S.Ct. at 602, 102 L.Ed.2d at 636.

The State's other argument contends that the critical factor is not the length of the ban, but its context. It points to Geders, where the overnight ban was consultation "about anything." In the case before us, the trial court directed defense counsel not to discuss defendant's testimony with defendant and directed defendant not to discuss his testimony with anybody. Implicitly, the trial court permitted defendant to discuss other aspects of the case. In support, the State primarily relies on Snyder v. State, 657 A.2d 342 (Md.App. 1995).[3]

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[3]Although the State cites several other out-of-state cases, they basically involve short lunch breaks or instances when defense counsel did not object. They do not assist the State.

Snyder is not persuasive. First, we note that the appellate court reversed and remanded for a new trial on another point. Second, the error was not preserved because defendant did not object. Thus, the court's discussion of this issue is dicta.

In contrast and more directly on point is another post-Perry case, United States v. Cobb, 905 F.2d 784 (4th Cir. 1990) cert. denied, Hatcher v. United States, 498 U.S. 1049, 111 S.Ct. 758, 112 L.Ed.2d 778 (1992). In Cobb, defendant was being cross examined Friday afternoon when the trial court announced its weekend recess. The trial court ordered defendant "not to discuss his ongoing testimony with anyone, including his attorney, during the weekend recess." Cobb, 905 F.2d at 786. Defendant objected, claiming violation of his Sixth Amendment rights. The objection was overruled.

The Fourth Circuit found this order violated the Sixth Amendment and the principle laid down in Geders. The Cobb court stated:

> To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?
>
> Similarly, the Supreme Court recognized the reality of the situation in both Perry and Geders. We have no difficulty in concluding that the trial court's order, although limited to discussions of Cobb's ongoing testimony, effectively denied him access to counsel.

Id. at 792 (emphasis added; footnotes omitted).

The briefs and our research have disclosed only one prior Missouri case which addressed this issue. In State v. Baldridge, 857 S.W.2d 243 (Mo.App., W.D. 1993), the State was cross examining the defendant when the trial court considered an overnight recess. The trial court said that if it granted the recess, it meant that the defendant could not talk with defense counsel. Defense counsel replied, "That's fine." Id. at 252.

Thereafter, the trial court addressed the defendant, instructing her she would not be able to talk to her attorney overnight. She replied, "Okay." Id.

In denying her point, the Baldridge court observed that counsel failed to object to the denial of contact. Moreover, defense counsel orally acceded to the trial court's action. The court concluded that the defendant waived appellate review of this point. Id. Baldridge is not applicable in the case before us because defense counsel specifically objected on the basis of the Sixth Amendment.

Here, the trial court's order proscribed defendant from speaking with his attorney about his testimony. This proscription, which lasted almost two and one-half days, violated defendant's Sixth Amendment right to assistance of counsel. Point granted.

III. POST-ARREST SILENCE

We next address defendant's third point. In this point, he claims the trial court erred by allowing the State to elicit evidence of defendant's post-arrest silence and repeatedly comment on it.

The silence of an accused while under arrest is inadmissible to show affirmative proof of guilt or to impeach

testimony. State v. Hlavaty, 871 S.W.2d 600, 606 (Mo.App., E.D. 1994). It may not be shown that an accused failed to volunteer an exculpatory statement. Nor may it be shown that, by the accused's silence, the accused failed to deny or explain, while under arrest, an incriminating fact about which no question was asked. State v. Howell, 838 S.W.2d 158, 161 (Mo.App., S.D. 1992).

These constitutionally based principles apply where the defendant "stood mute"; they do not apply where a defendant did not stand mute. Id. They also apply when the defendant claimed the privilege to remain silent in the face of accusation. If no accusation was made, obviously the principle is not applicable. Id.

In his brief, defendant refers to several instances which he claims violate these principles. We consider them in turn.

A.

A Riverside, California Sheriff's deputy went to defendant's home the day after the bodies were discovered. The deputy asked defendant if he would answer a few questions. Defendant agreed and they went to a bedroom. Deputy produced a tape recorder. Defendant became very nervous and said, "I think I need to talk to a lawyer. I don't want to talk." After conferring with his sergeant, deputy turned on the tape recorder and read the Miranda rights to defendant.

At trial, the tape was played. It reflected that after defendant stated he understood his rights, deputy asked, "Having those rights in mind, are you willing to talk to me?" Defendant responded, "I [sic] rather have a lawyer first."

The trial court did not err in overruling defendant's objection to this testimony. Defendant was not under arrest, nor had he been accused of anything. Under such circumstances, the above principles are not applicable.

B.

Two St. Louis detectives flew to California to collect physical evidence from defendant, such as hair samples, blood samples, and fingernail scrapings. One detective testified, "The District Attorney advised us that [defendant] had previously invoked his Miranda Rights, therefore, we wouldn't be able to question him about the incident." The other detective testified, "[Deputy] informed us when he responded to [defendant's] house that he . . . had invoked his Miranda Rights."

The two detectives picked up defendant at the jail and took him to the sheriff's office. En route, defendant said he wanted to talk about the case. A detective read his Miranda rights and defendant waived them.

At the sheriff's office, the detectives conducted a lengthy interview with defendant. Defendant told several different versions as to how the members of his family met their death.

The facts in State v. Mathenia, 702 S.W.2d 840 (Mo. banc 1986) are similar. There, the sheriff testified he advised defendant of his rights and the defendant did not then make a statement. The supreme court found that these statements were merely preliminary to the admission of the defendant's later statement. Id. at 842. The testimony that defendant previously invoked his Miranda rights "merely crystallized what was already suggested by the fact that [defendant] ultimately did make a statement." Id.

In the case before us, the two detectives' references to the Miranda rights and defendant's initial invocation of them did not violate his Fifth Amendment rights. These references were not used as "affirmative proof" or "to impeach" defendant. The trial court did not err in overruling defendant's objection.

C.

Defendant was returned to St. Louis and was taken to the St. Louis County Police Department. There, a police officer advised him of his Miranda rights. He agreed to talk with the officer.

The officer left the room. When she returned, she and her partner brought with them a sledgehammer, a pillow, and a photograph. Defendant said he did not buy the hammer. He did not say anything about the pillow or the photograph. Defendant complains about the officer's testimony that he did not say anything about the pillow or photograph.

We find no error. Once the right to remain silent has been waived, testimony describing certain silence is a fair subject for comment at trial until the waiver is clearly revoked. State v. Tims, 865 S.W.2d 881, 885 (Mo.App., E.D. 1993). Here, defendant had clearly waived his right to silence at the time of his statement.

D.

Prior to trial, the trial court conducted a hearing on defendant's motion to suppress. Defendant testified at that hearing.

Defendant also testified at trial. On cross examination, the State used a transcript of defendant's

testimony at the suppression hearing in its attempts to impeach his testimony.

At trial, defendant testified that the St. Louis detectives, referred to in section B above, made statements about his wife and son which he took as threats. He said their threats caused him to say certain things on the tape-recorded statement which were lies.

On cross examination, defendant acknowledged making previous statements under oath. He acknowledged saying that the officers did not physically harm him or threaten to do so. Also, he indicated the detectives did not promise him anything to induce him to make the taped statement.

The State then asked defendant if he remembered testifying about whether anybody forced him to make a tape recorded statement. He said that he did not "recall that." The State then quoted from the transcript, saying:

> All right. Starting up at page 47, line number 5. On line number 5 it says, Question: "Yeah. On direct examination, you never mentioned anything about telling the officer you didn't want to speak to them except at your house at the very beginning, did you?" Answer: "I told Sheriff Mullins I did not want to speak to them." Question: "Okay. Well, then during this interview process with the police officers are you saying that you also told them at some point you didn't want to talk to them." Answer: "Yes, I did say that."

Defense counsel objected, referring the trial court to Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In addition, he requested a mistrial. The trial court

sustained the objection and ordered the jury to disregard. However, it denied the motion for mistrial.

We observe that although the quoted question does not directly impeach, it was clearly used for that purpose. The silence of an accused while under arrest is inadmissible to impeach testimony. Hlavaty, 871 S.W.2d at 606. Thus, at retrial, the State should not be permitted to use this question and answer to impeach defendant.

IV. PRIOR CONSISTENT STATEMENTS

We next address defendant's fourth point. In this point, he claims the trial court erred "when it refused to allow [defendant] to present testimony of his prior consistent statements from witnesses Brenda Baumbach and George Morley in order to rebut charges of recent fabrication, and Dr. Max Givon, to rehabilitate [defendant] after cross examination on prior inconsistent statements."

A.

At trial, the State raised objections before the testimony of both Baumbach and Morley. The objections related to hearsay statements allegedly made by defendant.

The trial court sustained the objections. Concerning Baumbach, it told defense counsel he could "get into what she saw but not what she heard." For Morley, the trial court prohibited any testimony "as to any prior consistent hearsay statements of the defendant about . . . flights to St. Louis during the Navy, using a fake name and anything in that regard."

Defendant claims the statements of Baumbach and Morley were not hearsay, but rather were admissible to rebut charges of recent fabrication. In support of his position, he primarily relies on State v. Mueller, 872 S.W.2d 559, 563 (Mo.App., E.D. 1994) and State v. Ramsey, 864 S.W.2d 320, 329 (Mo. banc 1993).

Mueller held that "where a witness is impeached by proof of inconsistent statements, then proof of a statement made by the witness prior to the inconsistent statement, which is consistent with the trial testimony, is admissible to rehabilitate the witness." Mueller, 872 S.W.2d at 563. Similarly, Ramsey provides that prior consistent statements are admissible for the purpose of rehabilitating a witness whose credibility was attacked by express or implied claims of recent fabrication of trial testimony. Ramsey, 864 S.W.2d at 329.

In his brief, defendant points to several instances in the record which he contends supports his right to use the "hearsay" statements. We have carefully reviewed the cited instances. Nothing in the record reflects the State offered an inconsistent statement or a statement that was impliedly inconsistent with defendant's claims.

Further, It appears that the offered evidence could be considered cumulative. Thus, we cannot say the trial court abused its discretion in sustaining the State's objections.

B.

In rebuttal, Dr. Max Givon testified concerning whether defendant suffered from a dissociative disorder. During cross examination, defendant sought to elicit statements he made to Dr. Givon about his wife being

charged as an accessory if he did not cooperate. The State objected.

A lengthy colloquy ensued. The trial court observed that defendant's wife testified that she was threatened with being charged as an accessory. Further, the trial court noted that the statements were made to Dr. Givon in December, 1992, 17 months after the crime.

Also, the State pointed out (1) it had not asked questions suggesting defendant's statements were a recent fabrication and (2) Dr. Givon was a rebuttal witness on the issue of dissociative disorder. The trial court sustained the objection.

The trial court has discretion in limiting the scope of cross examination, particularly on collateral matters. See State v. Dunn, 817 S.W.2d 241, 245 (Mo. banc 1991). We find no abuse of that discretion. Point denied.

V. JURY INSTRUCTIONS

In his fifth point, defendant claims the trial court erred when it refused to instruct the jury pursuant to MAI-CR3d 300.20 and 306.04. Those instructions are required when "statements and information acquired as a result of the mental examinations made pursuant to Section 552.030 are admitted into evidence.' Notes on Use 3 to MAI-CR3d 300.20 and Notes on use 3 to MAI-CR3d 306.04 (emphasis added).

Defendant gave the notice required by §552.030.2 indicating his intent to rely on the defense of not guilty by reason of mental disease or defect. However, he did not follow the procedure set forth in §552.030.3 for the appointment of an examiner. Nor does he point to anything in the record indicating that the examiner's report required by

§552.030.3 was filed with the trial court. Moreover, prior to trial, defendant withdrew his notice of intent to rely on this defense.

At trial, defendant asked the trial court to read MAI-CR3d 300.20. In the discussion concerning this issue, the trial court observed that defense counsel had never contended that he "wanted these examinations to show what [defendant's] mental condition was at the time of the offenses." Defense counsel candidly agreed "that it has not been our position that there was a mental disorder that was occurring at the time" the allegations occurred.

In addition, defendant does not point us to any evidence suggesting the doctors made findings that defendant was not responsible because of a mental disease or defect. The trial court did not err in refusing to read MAI-CR3d 300.20 or to give MAI-CR3d 306.04. See State v. Strubberg, 616 S.W.2d 809, 816-17 (Mo. banc 1981); State v. Haslar, 887 S.W.2d 610, 617 (Mo.App., W.D. 1994). Point denied.

VI. PRIOR INCONSISTENT STATEMENTS

In his seventh point, defendant alleges the trial court erred "when it refused to allow {defendant] to cross examine State witnesses about various inconsistent statements." Defendant claims he was prejudiced because the rulings left him without corroboration for his defense.

Prior to trial, an issue arose concerning the admissibility of evidence concerning defendant's father's sexual abuse of children. The trial court determined that such evidence was relevant if it pertained to the three boys, i.e. defendant, Nick, or Joe. Further, the trial court held that any of father's activities outside the three boys was irrelevant.

A.

Cousin testified for the State. Defendant's brief alleges the State "opened the door to the inquiry by asking if they feared [father]." Defendant gives no page reference to such an inquiry of cousin.

Pursuant to its stated policy, the trial court barred cross examination of cousin on whether father sexually molested her. Thus, she was not asked if she had been sexually molested as a child. As a result, there was "no statement" to compare with a prior inconsistent statement. Nevertheless, defendant proposes that cousin's deposition testimony about sexual molestation as a child should have been allowed as a prior inconsistent statement.

A trial court has discretion to limit cross examination and introduction of evidence for impeachment. State v. Gee, 822 S.W.2d 892, 895 (Mo.App., E.D. 1991). This discretion includes the duty to determine the relevance, materiality, and remoteness of the proffered impeachment evidence. This court will not disturb the trial court's ruling unless there is a clear abuse of discretion. Id. We find no abuse of discretion.

B.

Defense counsel cross examined aunt and determined that she never saw defendant with a black eye. Defendant then wanted aunt to identify a photo of defendant taken at her house, apparently showing him as a boy with a black eye.

The State objected. A bench conference was held. The trial court told defense counsel that if he had evidence father struck "the kids and caused the black eye then you can

ask her, but if you don't have it," he could not ask her. Defense counsel did not indicate he had such evidence.

The trial court sustained the objection. However, it said that if later during the trial defense counsel acquires this evidence, the court would order the witness recalled. Nothing in the record indicates defense counsel made such an offer or representation. We find no abuse of discretion.

C.

The final allegation concerns the trial court's refusal to allow defendant to question a witness about the specifics of what cousin told him. Suffice to say, the trial court correctly permitted defendant to lay a foundation for the possible impeachment of cousin. However, defendant did not recall cousin. Therefore, she was never asked about any inconsistency in her statements. Point denied.

VII. OPINION TESTIMONY

In his eighth point, defendant claims the trial court erred when it overruled his objections and "allowed State witnesses to testify as to whether, in their lay opinions, they thought [defendant] was lying."

Defendant points to the testimony of seven different witnesses. We have carefully read the testimony of those witnesses. In only one did a witness express the opinion that the defendant was lying.

The one witness was a California deputy sheriff. Among other things, she related defendant's statements to her shortly after he arrived at the jail. Defendant recounted his activities of the previous few days, including that he had

gone camping on Thursday. She described defendant's appearance and mannerisms.

In cross examination, she was asked about statements she made in her deposition. On redirect, the State followed up with additional statements from her deposition. The trial court permitted these questions because defendant opened the door. Ultimately, the State asked, "did you at the time feel that he was being genuine or not?" She responded, "I felt he was lying."

We recognize that generally, opinion testimony is inadmissible when the trier of facts is as capable as the witness to draw conclusions from the facts provided. Sidebottom v. State, 781 S.W.2d 791, 795 (Mo. banc 1989). Here, the State presented substantial evidence that defendant lied about his activities. Although the deputy sheriff's conclusion may have been incorrectly solicited and given, defendant suffered no prejudice. Point denied.

VII. RELEVANCY

In his ninth point, defendant claims the trial court erred when it "refused to allow [defendant] to elicit information from defense witnesses." Defendant points to eight instances where he contends the trial court excluded evidence helpful to his case.

Each trial court is vested with broad discretion in ruling on questions of relevancy of evidence. Absent a clear showing of abuse of that discretion, this court will not disturb the trial court's ruling. State v. Snider, 869 S.W.2d 188, 193 (Mo.App., E.D. 1993); State v. O'Dell, 787 S.W.2d 838, 842 (Mo.App., E.D. 1990).

We have carefully examined each of the eight instances. The trial court did not abuse its broad discretion in its rulings concerning these matters. Point denied.

IX. SUFFICIENCY OF EVIDENCE

In his tenth point, defendant claims the trial court erred "in denying [his] motion for judgment of acquittal at the close of all the evidence, in submitting the case to the jury, and entering judgment, in that there was insufficient evidence to support the jury's conclusion that [defendant] either committed the physical acts or possessed the mental intent for murder first degree."

When reviewing for sufficiency of the evidence, this court accepts as true all of the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. State v. Dulany, 781 S.W.2d 52, 55 (Mo. banc 1989). Our review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. Id.

Viewed in this light, the evidence previously stated is sufficient to support the jury's verdicts. Point denied.

X. EXPERT OPINIONS

In his eleventh point, defendant claims the trial court erred in allowing three witnesses to express expert opinions. He contends the State did not lay a sufficient foundation of the witnesses' qualifications.

"The test of an expert's qualification is whether the expert has knowledge from education or experience which

will aid the trier of fact. The qualification of an expert is a matter resting primarily in the sound discretion of the trial court." State v. Seddens, 878 S.W.2d 89, 92 (Mo.App., E.D. 1994) (citation omitted).

Defendant's first complaint concerns the testimony of a commander of the St. Louis County Police homicide unit. The State asked, based on his experience, if the "location of the gunshots to the back there and their proximity to each other" would suggest how they occurred. Defendant objected on the basis it called for a conclusion and speculation.

On appeal, he contends the State failed to show that the officer had "specialized training in making determinations as to where, how, and from what distance shots were fired and wounds inflicted." That objection was not made at trial and cannot be raised for the first time on appeal. Moreover, practical experience, rather than scientific study or formal training, may qualify a witness to testify as an expert. Id.

Here, the officer had been a homicide investigator for 15 years. During that time, he examined several hundred homicide scenes. Most of these homicides involved firearms. His investigations examined the circumstances surrounding the shootings. The officer also testified to the position of the body when he first found it. The trial court did not abuse its discretion.

Defendant's next complaint concerns testimony of an evidence technician with nine years experience. The State asked him if the knives he found near father's body appear to be sharp enough and of sufficient strength to cut a typewriter electrical cord. Defendant objected on lack of foundation. The trial court overruled the objection.

We find no abuse of discretion in overruling that objection. The knives were received in evidence and the jury had the opportunity to observe them. Thus, it may be questionable whether the question asked was a proper subject for an expert opinion. However, that objection was not made.

The final complaint concerns testimony of a deputy medical examiner. The State asked the examiner,

> Is there anything about the exit wound being there and the retrieval of a bullet between there and a shirt that [Nick] had on that would be inconsistent or consistent with [Nick's] being in the position as he was, in State's Exhibit Number 8?

The examiner replied, "Well if --- if the bullet were found, one could speculate that the fact ---." Defendant counsel interrupted, objecting on the basis of speculation and lack at training in this field. A bench conference followed, and ultimately the trial court overruled the objection.

Although the objection was overruled, the witness did not answer the question. Rather, the State asked the examiner a similar, but different question. The examiner responded, "It's certainly consistent with it, although I don't think it proves it in my opinion." It is virtually impossible to conclude that this answer in any way prejudiced defendant. Point denied.

XI. OTHER POINTS

Defendant raised two other points. In his second point, he alleged trial court error in refusing to permit a witness to testify. The trial court sustained the State's objection due to the lateness of endorsement. Due to our deposition, this point is moot.

In his sixth point, defendant claims the trial court erred when it refused his tendered self-defense instructions. On retrial, this instruction, if given, will be tailored by the evidence presented at that time. Thus, an extended discussion of this point would not serve any jurisprudential purpose. Rule 30.25.

The trial court's judgment is reversed, and the cause is remanded for a new trial.

Stanley A. Grimm, Judge

Clifford H. Ahrens, Presiding Judge, concurs.
James A. Pudlowski, Judge, concurs.

SUPREME COURT OF MISSOURI

en banc

State of Missouri, Respondent,	)	
vs.	)	
	)	
Emory M. Futo, Appellant.	)	S.C. No. 78950
	)	E.D. Nos. 63922 & 67201
Emory M. Futo, Appellant,	)	
vs.	)	
	)	
State of Missouri, Respondent.	)	

ORDER

Cause ordered retransferred to the Missouri Court of Appeals, Eastern District.

Day - to - Day

John C. Holstein, Chief Justice

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

June 25, 1996

Mr. Breck K. Burgess
Assistant Attorney General
P. O. Box 899
Jefferson City, Missouri 65102

In re: State of Missouri vs. Emory M. Futo
Emory M. Futo vs. State of Missouri
Supreme Court No. 78950

Dear Mr. Burgess:

This is to advise that the Court this day entered an order in the above-entitled cause, a copy of which is attached herewith.

Very truly yours,

THOMAS F. SIMON

Clerk

Attachment
cc: Nancy L. Vincent

IN THE SUPREME COURT OF MISSOURI
IN BANC
No. 78950

May Session, 1996

State of Missouri, Respondent,

vs.

Emory M. Futo, Appellant,

Emory M. Futo, Appellant,

vs.

State of Missouri, Respondent.

THE STATE OF MISSOURI

to

the Judges of the Missouri Court of Appeals, EASTERN District,

GREETINGS:

Now at this day, on consideration of the application of respondent

to transfer the above-entitled cause, No. 63922 & 67201, from the EASTERN DISTRICT, Missouri Court of Appeals, it is ordered that said application be, and the same is hereby sustained.

Therefore, you, as Judges of the Missouri Court of Appeals, EASTERN DISTRICT, are ordered to send to this Court on or before the 25th day of July, 1996, a full and complete transcript of the record and proceedings in your court, together with copies of all records and briefs filed in your court in the said cause.

It is further ordered that you recall your mandate, if the same has issued, and that you take no further action in this case.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Court, at my office in the City of Jefferson, this 25th day of June, 1996.

THOMAS SIMON
Clerk, Supreme Court of Missouri

CHRISTINA S VINSON
Deputy Clerk

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD

FROM: DEIRDRE O. SMITH, CLERK

DATE: May 6, 1996

RE: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

1.	63922	State of Missouri, Respondent
	vs.	Futo, Emory M., Appellant
2.	67178	Jones, Farrell G. et al., Appellant
	vs.	Sparkman, James, Respondent
3.	67629	Jacobs, Richard E. et al., Appellant
	vs.	Georgiou, George & Judy Alexander, Respondent
4.	67806	Wilson, Tresa J, Appellant
	vs.	Sullivan, Daniel J, Respondent
5.	67838	State of Missouri, Respondent
	vs.	Robertson, Calvin L., Appellant
6.	67862	Miller, Carla J. & Megan, Respondent
	vs.	Variety Corporation, Appellant
7.	68325	Missouri Highway & Trans Comm, State ex rel, Respondent

	vs.	Barton, David J. et al., Appellant
8.	68493	State of Missouri, Respondent
	vs.	Roberson, Calvin L., Appellant
9.	68559	Stumpf, Mary Ann, Appellant
	vs.	Hoerle, Audrey, Respondent
10.	68614	Buck, Linda, Appellant
	vs.	American Family Mutual Insurance Company, Respondent

Transcript of Discussions of trial court's order for respondent to not discuss his testimony with his counsel during breaks:

(A DISCUSSION WAS HAD OFF RECORD.)

MR. SINDEL: I'll sum it up, you tell me when I'm wrong. I have briefly off the record indicated to the Court, the Court has had admonitions to counsel for the State, and I assume their investigators as well, concerning discussions with witnesses about their testimony and about any other testimony that may have occurred before or after. I had asked the Court whether or not the similar admonition applied between me and the defendant, the Court indicated that there was and that I would be ordered not to discuss with him the nature of his testimony or anything else concerning his testimony and I indicated to the Court I would abide with that ruling. I wanted to put on the record that I have concerns and I object to the ruling based on the Sixth Amendment privileges the defendant has to consult with counsel and communicate with counsel.

THE COURT: Do you want to make a comment about that?

MR. CRADDICK: Judge, I believe that once they get on the witness stand he has to be treated as if he never gets off until it's completed, so, I don't know.

THE COURT: I agree.

MR. CRADDICK: I don't think that that the Sixth Amendment right to counsel is violated in any way

because once he starts to testify, he is up there until he gets done. So, I don't believe it does violate anything.

THE COURT: I agree with the State's position. I'll direct counsel, just like I've directed other counsel, not to discuss the testimony with your client.

THE COURT: Off the record.

(A DISCUSSION WAS HAD OFF RECORD.)

(PROCEEDINGS RETURNED OPEN COURT.)

* * *

made that statement to Frank and Loretta, you knew the difference between what the truth was and what a lie was; didn't you?

(THE FOLLOWING PROCEEDINGS WERE HAD AT SIDEBAR OUT OF THE HEARING OF THE JURY:)

THE COURT: Yes.

MR. SINDEL: The only thing is I wanted to make a record of the fact that I am relatively convinced the Court will give me the same admonition now as he gave me at the lunch time and I will -- I will follow that admonition although I do believe that it does interfere with his Sixth Amendment and Missouri constitutional amendments to a lawyer, but I will not have any conversation with him and I will direct all of my staff not to have any conversation with him under the Court's ruling.

THE COURT: All right. And that's the same ruling and I have even been telling witnesses, including the defendant, don't discuss your testimony with anybody.

MR. SINDEL: I don't believe that.

THE COURT: With the lawyers.

MR. CRADDICK: Judge, judge so we don't have this problem again, I would ask the Court --

MR. SINDEL: I would instruct him in that regard if you're asking me to do that.

MR. CRADDICK: I would ask the Court or have Rick instruct his witness that no question that I ask them will directly or indirectly relate to anything Mr. Futo did towards anybody else's wife, girlfriend, child, any other relative besides those within the parameter we've been speaking.

THE COURT: Okay. I can do it or you can do it.

Relevant portion of motion for a new trial

> 89. The trial court erred in ruling that the defendant could not speak with his attorney during any breaks of court after defendant had taken the witness stand. A criminal defendant has an absolute right to consult with his attorney at all critical stages of the proceedings, especially during the trial. The defendant's testimony lasted two and one half days, and at each break and after the conclusion of the court on each day, the defendant was precluded from speaking to his attorney about any matter. The court's ruling denied the defendant his rights to effective assistance of counsel, due process and equal protection of the law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

(Legal File 661-662).

(3)

Supreme Court, U.S.
FILED
MAR 11 1997
CLERK

No. 96-1259

In the

Supreme Court of the United States

October Term, 1996

STATE OF MISSOURI,

Petitioner,

v.

EMORY M. FUTO,

Respondent.

On Petition for Writ of Certiorari
To the Missouri Court of Appeals
For the Eastern District

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WEST VIRGINIA AND WISCONSIN AND THE TERRITORY OF THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the conviction of a criminal defendant must be reversed if a trial judge issues an order which precludes the defendant from discussing his ongoing testimony with his attorney during an overnight recess in his cross-examination, but permits all other discussion between defendant and counsel.

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The amici curiae states and territory, through their undersigned attorneys general, respectfully submit this brief in support of the petitioner State of Missouri.

INTEREST OF THE AMICI CURIAE

Recesses of varying lengths occur for a host of legitimate reasons in even the briefest of criminal trials. Oftentimes, a recess will occur while the defendant is on the witness stand. No witness, including a criminal defendant, has a right to discuss his ongoing testimony with counsel during the recess. It logically follows that a trial judge should be able to issue an order narrowly tailored to prohibit such a discussion. This Court's decisions in *Geders v. United States,* 425 U.S. 80 (1976), and *Perry v. Leeke,* 488 U.S. 272 (1989), however, cast serious doubt on a trial court's ability to do precisely that. The *Perry* Court described the line between what is and what is not constitutional as "a thin one," 488 U.S. at 280; trial courts have had to guess when that "thin" line is crossed or even approached. Because this issue arises in countless criminal trials, the 24 amici states and territory have a strong interest in this Court clarifying this area of the law.

This interest is made even stronger by the lower courts' reading of *Perry* as mandating automatic reversal when an error is made. This severe result -- which in this case led to the reversal of a multiple-murder conviction -- inevitably has a powerful chilling effect on judges and prosecutors who seek to enforce the ban on defendants discussing ongoing testimony with their counsel. The states therefore also have a further interest in this Court revisiting and clarifying whether the prejudice analysis adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), and the harmless error doctrine apply in this setting.

REASONS FOR GRANTING THE WRIT

A. Certiorari Should Be Granted Because The Absence Of A Clear Rule On The Limits Trial Courts Can Place On Communications Between Defendants and Counsel During Breaks In Defendants' Testimony Has Caused Conflict Among The Courts And Chilled Enforcement Of The Ban On Defendants Discussing Their Ongoing Testimony With Counsel.

This Court held in *Perry* that a trial judge may order a defendant and defense counsel not to discuss anything during a "brief" recess because of the "virtual certainty" that the discussion will only concern the ongoing testimony. 488 U.S. at 283-84. Under *Geders*, however, a trial judge may not ban a defendant and defense counsel from discussing "anything" during an overnight recess because that broad order coupled with the length of the recess would likely infringe on proper consultation about matters unrelated to the testimony. 425 U.S. at 88. The large grey area between these two decisions has been a source of considerable confusion.

In particular, neither *Geders* nor *Perry* expressly resolved whether a narrowly-tailored order prohibiting only the discussion of the defendant's ongoing testimony during an overnight recess (or during any recess other than a "brief" one) violates the Sixth Amendment. This Court should grant certiorari to answer that question in this case because (1) the uncertainty as to the rule has left the lower courts in severe conflict, and (2) this uncertainty -- and the threat of automatic reversal if error is found -- have inevitably made judges and

prosecutors reluctant to act to prevent improper interference with defendants' testimony during a recess when the recess is any longer than the fifteen minute one discussed in *Perry*. This uncertainty undermines the principles of *Perry* and needlessly jeopardizes many criminal convictions.

The amici states submit that this Court can provide needed clarity in this area by granting the State of Missouri's petition for a writ of certiorari and expressly holding that the scope of the trial court's order is dispositive. Where the trial court prohibits a defendant and his counsel from discussing ongoing testimony during a break but does not prohibit them from discussing any other aspect of the trial, the order should be found constitutional regardless of the length of the break.

1. ***Conflict Among the Courts***. A "crazy-quilt" of decisional law has been created by the uncertainty in the law. Some courts, such as the Missouri court in this case, have focused primarily on the length of the recess and held that an overnight recess is constitutionally too long even though the order is narrowly tailored to prevent only discussion of the defendant's ongoing testimony. See, e.g., *State v. Futo*, 932 S.W.2d 808, 812-15 (Mo. Ct. App. 1996); *United States v. McLaughlin*, 1997 U.S. Dist. LEXIS 2113 (D.D.C. Feb. 14, 1997) (distinguishing *Perry* from *Geders* based on length of recess); *United States v. Cobb*, 905 F.2d 784, 791 (4th Cir. 1990), cert. denied sub nom. *Hatcher v. United States*, 498 U.S. 1049 (1991) (weekend recess too long); *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986) (narrow order banning discussion only of defendant's testimony over weekend recess requires automatic reversal because the recess was "substantial"); *People v. Joseph*, 646 N.E.2d 807, 809 (N.Y. 1994) (narrow order forbidding discussion of testimony during

weekend recess violates Sixth Amendment because the "critical factor" in the analysis is the length of time defendant is denied access to counsel).

Other courts have focused primarily on the scope of the trial court's order: if it is limited in scope to prohibiting discussion of the defendant's ongoing testimony, it is constitutional irrespective of the length of the break. See, e.g., *Webb v. State,* 663 A.2d 452, 455-61 (Del. 1995) (upholding narrowly-tailored order during overnight recess); *Snyder v. State*, 657 A.2d 342, 356-57 (Md. Ct. Spec. App. 1995) (same); *Parker v. State*, 469 S.E.2d 410 (Ga. Ct. App. 1996) (no violation when weekend recess is coupled with narrowly-tailored order limited to ongoing testimony unless defendant or counsel indicate on the record they wished to consult about other matters and were prevented from doing so by the order).

Therefore, what is an unconstitutionally "long" recess in one jurisdiction, necessitating reversal, is constitutional in another. Moreover, in those jurisdictions where the courts have looked to the length of the recess -- rather than to the scope of the order -- there is additional uncertainty created. Where, between a fifteen-minute break and an overnight recess, is the line drawn?

2. ***Impact of the Uncertainty***. The law as it stands now is a trap for judges and prosecutors who in good faith seek only to prevent improper third-party influence on defendants' ongoing testimony. Because the constitutional line "is a thin one," *Perry,* 488 U.S. at 280, and the penalty for crossing that line has been automatic reversal, imposing any restrictions upon discussions between defendants and counsel during breaks in defendants' testimony is extremely risky. Without

express guidance from this Court, improper coaching by defense counsel during recesses will remain largely unchecked.

A criminal defendant has "no constitutional right to consult with [counsel] while he is testifying." *Perry*, 488 U.S. at 281. Moreover, it is the duty of the trial judge to ensure that cross-examination of the defendant is unfettered by third-party interference in order to protect the truth-finding function of the trial. *Id.* at 282-83. The current state of the law makes it extremely difficult for trial judges to fulfill that duty. Judges in jurisdictions such as Missouri are forbidden from banning discussions of ongoing testimony during "long" breaks; and they are left uncertain when a "brief" break becomes a "long" one during which bans on such discussions are considered unconstitutional.

Trial judges (and prosecutors) are in a similar bind in jurisdictions which have not established definitive rules in this area. This is principally because lower courts have applied an automatic reversal rule when errors are made in this context. In *Perry*, the Court refused to apply the prejudice analysis of *Strickland*. *Perry*, 488 U.S. at 278-80. The court below and others have interpreted this to require reversal when a *Geders-Perry* error is made, even if the error was harmless. *Futo*, 832 F.2d at 814; see, e.g., *Jones v. Vacco*, 944 F. Supp. 229 (S.D.N.Y. 1996); *Joseph*, 646 N.E.2d at 809; *State v. Stover*, 881 P.2d 553, 556-57 (Idaho Ct. App. 1994).

As the law now stands, a judge or prosecutor risks undoing the best efforts of the government and the jury simply by issuing an order intended to stop wrongful communication between defendants and their counsel. This is especially problematic when a recess that was intended to be "brief" at the

outset becomes "long" due to unforeseen circumstances (e.g., a lunch break becomes a three hour recess because a defense witness was late, the judge has a family emergency, a juror takes ill, or there is need for an immediate hearing *in limine* to litigate a new legal matter raised by the defendant's testimony). See, e.g., *Jones*, 944 F. Supp. 229 (overnight recess became weekend recess due to snow storm). Trial courts rely on *Perry* at their peril.

Certiorari should be granted so that this Court may adopt a simple rule that solves this problem -- a rule which flows directly from the earlier decisions in this area. The implicit, logical, corollary of *Perry* and *Geders*, but one which only some of the lower courts have recognized, is that the focus should be on the scope of the trial court's order, rather than on the length of the recess. The problem in *Geders* was that defendant and his counsel could not talk about **anything** -- a problem of scope. That problem did not exist in *Perry* because, as the Court found, the break was too short for anything but the defendant's ongoing testimony to be discussed. 488 U.S. at 283-84.

An order which prohibits a defendant from speaking with counsel about ongoing testimony, but does not forbid discussion of any other topic, should therefore be held constitutional regardless of the length of the break. This analysis is tethered closely to the rights and interests of concern to the Court in *Geders* and *Perry;* and judges and prosecutors would not have to guess when the thin line between what is constitutionally "brief" and what is unconstitutionally "long" has been crossed.

This Court recognized in *Perry* that this issue is "important" and "frequently arises." 488 U.S. at 277. Recesses occur during a defendant's testimony for a host of legitimate reasons despite the best efforts of all concerned to avoid them. Resolution of the issue presented would clarify the approach to be taken when recesses inevitably occur in thousands of criminal trials across the land.

B. Certiorari Should Be Granted To Establish That There Is A Prejudice Component To Violations Of The Right To Consult With Counsel During Recesses In The Midst Of Defendants' Testimony

As noted, the uncertainty left by *Geders* and *Perry* has caused lower courts (such as the Missouri Court of Appeals here) to read those decisions as requiring automatic reversal of the conviction when an error is made. Certiorari should be granted not only because the automatic reversal rule has raised the stakes for a misstep in this uncertain area of the law, but also because it would provide this Court with the opportunity to revisit the role prejudice should play in the analysis of the Sixth Amendment right at issue.

Decisions of this Court since *Perry* have called into question the express refusal by the Court in *Perry* to apply a *Strickland v. Washington* prejudice analysis. *Perry*, 488 U.S. at 279-80. This Court's precedents since *Perry* also provide strong support for incorporating the harmless error doctrine into the Sixth Amendment analysis here.[1]

---

[1] Although Missouri has not raised the question of prejudice in the lower courts or in its petition for certiorari, the amici states believe the prejudice issue is so inextricably interwoven into the issue presented in the petition that this Court should reach it as well. In particular, the question

1. ***Prejudice as a Component of the Violation***. In *Strickland*, this Court held that a defendant must prove prejudice to establish a violation of the Sixth Amendment right to effective assistance of counsel. In dictum, this Court in *Perry* refused to follow *Strickland*. *Perry*, 488 U.S. at 278-80; see *id.* at 285 ("In view of our ruling, it is quite unnecessary to discuss whether prejudice must be shown when the right to counsel is denied.") (Kennedy J., concurring). The Court stated that prejudice is not part of the constitutional analysis when there is "direct governmental interference with the right to counsel." *Id.* at 279. That dictum, however, has been undermined by decisions of this Court since *Perry*.

When this Court decided *Perry*, there was uncertainty as to the relationship (if any) between the source of the violation and the need to show prejudice. In *Strickland*, the Court indicated that prejudice need not be shown when there was direct government interference with the right to counsel (whether that interference was the fault of a trial judge, a prosecutor or a police officer). 466 U.S. at 686, 692. By contrast, in *United States v. Cronic*, 466 U.S. 648, 662 n.31 (1984), the Court held that the outcome does not turn on the source of the interference with representation by counsel. Rather, the outcome turns on whether the defendant has shown that the constraints, whatever their source, adversely affected the

---

whether the defendant must prove prejudice to establish a Sixth Amendment violation goes directly to the nature of the right--the very issue presented by Missouri in its petition and "fairly subsumed" within it. This Court should therefore grant review to address all the issues presented in the petition and in this brief. Cf. *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-38 (1991) (Stevens, J., dissenting).

fairness of the trial. *Id.* The Court in *Perry* chose the former approach.

The trend in Sixth Amendment jurisprudence, however, is unmistakably toward a requirement that the defendant prove both the denial of effective representation by counsel -- whatever its source -- and prejudice from which it can be concluded that he was denied a fair trial. See, e.g., *Satterwhite v. Texas,* 486 U.S. 249, 254-58 (1988) (state interference with Sixth Amendment right to counsel infected the entire capital sentencing proceeding but was subject to harmless error analysis). Indeed, it is now the rare constitutional violation which this Court deems sufficiently egregious and pervasive to warrant automatic reversal. See *Arizona v. Fulminante,* 499 U.S. 279, 306-07, 309-10 (1991). More to the point, it is only the rare Sixth Amendment violation that now escapes prejudice scrutiny. *Id.* at 306-07.

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. The central issue, therefore, is whether the Sixth Amendment violation denied the defendant a fair trial. Only when that question is answered in the affirmative will the defendant be entitled to reversal. See *Lockhart v. Fretwell*, 506 U.S. 364, 368-70 (1993). The outcome does not turn on who, or what entity, caused the violation. The Court in *Strickland* explained why it continued to presume prejudice for a handful of Sixth Amendment violations:

> Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [*Cronic*, 466 U.S.] at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy

> to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

466 U.S. at 692. That rationale is wholly inapplicable to the Sixth Amendment right at issue here.

As discussed at length in Section A above, the violation has not been "easy to identify." And in most cases, the prosecutor is not "directly responsible" for the recess. Many times, the recess is caused by circumstances beyond everyone's control. The realities of trial practice often require recesses despite the best efforts of everyone involved to avoid them. Moreover, the automatic reversal rule may encourage manipulation by the defense to encourage a recess during defendant's testimony or requests by the prosecution to continue that testimony into the wee hours to avoid a recess. In short, the violation is usually not "easy for the government to prevent" except by permitting defendants to do what they are not permitted to do. *Id.*

Prejudice is also not "so likely" here. Indeed, prejudice is manifestly *unlikely* in the usual case. The defense strategy will have been formulated, the defendant prepared, and his testimony discussed before he steps onto the witness stand. There will rarely be anything new to discuss at this stage of the trial *except for* the ongoing testimony itself, which cannot be discussed.

Finally, the inquiry into prejudice is worth the cost for the very same reasons it is worth the cost with respect to the myriad of alleged *Strickland* violations. Automatic reversal imposes a high cost on society, victims and witnesses, as

demonstrated by the reversal of the four murder convictions in this case.

2. ***Harmless Error***. Although *Perry* only addressed the *Strickland* prejudice analysis, its dictum has been interpreted by lower courts, including the court below, to preclude a harmless error analysis.[2] This Court need not, of course, reach the issue of harmless error if -- as the amici states suggest -- certiorari is granted and the rule proposed in Section A is adopted. Nevertheless, the granting of certiorari in this case would provide this Court with the opportunity to clarify the role of harmless error in this area. Simply put, any notion that *Geders* and *Perry* require automatic reversal does not survive scrutiny under *Arizona v. Fulminante* and its progeny. The Sixth Amendment violation at issue is "trial" in nature, thereby subject to harmless error analysis.

Harmless error review has become "an integral component of our criminal justice system." *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring). An automatic reversal rule in the *Geders-Perry* situation ignores this "integral component" and also necessarily ignores the sound policy

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[2] There is an important distinction between the prejudice and harmless error concepts. See *Lockhart*, 506 U.S. at 369 n.2. Where prejudice is an element of the Sixth Amendment violation, the defendant must affirmatively prove prejudice to establish the constitutional violation and win reversal. See *Strickland*, 466 U.S. at 687. There are other Sixth Amendment cases where the defendant does not need to prove prejudice to win reversal, but the state is afforded the opportunity to avoid reversal by proving that the established constitutional violation was nonetheless harmless beyond a reasonable doubt. E.g., *Satterwhite*, 486 U.S. at 254-58. See also *Webb v. State*, 663 A.2d 452, 460-61 (Del. 1995) (defendant need not prove prejudice to establish *Geders-Perry* violation, but court applied harmless error analysis).

undergirding the harmless error doctrine. As stated in *Arizona v. Fulminante*:

> the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

499 U.S. at 308 (quoting *Delaware v. Van Arsdall*, 475 U.S. 675, 681 (1986)).

In *Fulminante* -- decided more than two years after *Perry* -- this Court drove home the point that virtually all constitutional violations are subject to harmless error analysis. 499 U.S. at 306-07. That decision for the first time recognized a distinction between constitutional errors that are "trial" in nature, and subject to harmless error analysis, from those few that are "structural" in nature, and subject to automatic reversal. *Id.* at 309. A "trial" error is one that occurs during the presentation of the case, the impact of which may be quantitatively assessed in the context of the other evidence presented. *Id.* at 307-08. A "structural" error concerns the trial mechanism itself and defies harmless error analysis because it affects the conduct of the entire trial from beginning to end. *Id.* at 309-10. See *Sullivan,* 508 U.S. at 281; *California v. Roy,* 65 U.S.L.W. 3338 (Nov. 4, 1996) (*per curiam*).

Most Sixth Amendment violations are now considered "trial" in nature subject to harmless error analysis.

Fulminante, at 306-07, 309-10; see *Sullivan*, 508 U.S. at 282-83 (only the "rare case" is not subject to harmless error analysis) (Rehnquist, C.J., concurring). For example, direct state interference with the Sixth Amendment right to the presence of counsel has been held to be subject to harmless error analysis. *Satterwhite v. Texas*, 486 U.S. 249 (1988) (denial of counsel at death penalty sentencing phase psychiatric interview subject to harmless error review).

Moreover, the category previously carved out by this Court for "state interference with counsel's assistance," *Strickland*, 466 U.S. at 692, certainly does not survive the *Fulminante* analysis. Proof of "state interference" only begs the question whether the violation was "trial" or "structural" in nature. There certainly was "state interference" in *Satterwhite* with the right to counsel, yet this Court applied the harmless error doctrine. See also *Fulminante*, 499 U.S. at 307 (citing *Milton v. Wainwright*, 407 U.S. 371 (1972) (holding that the admission of a confession obtained in violation of the Sixth Amendment right to counsel was harmless beyond a reasonable doubt)).

Only those rare Sixth Amendment violations such as the complete denial of counsel by the state, *Gideon v. Wainwright*, 372 U.S. 335 (1963) -- that is, those violations that are truly "structural" in nature because they infect the entire trial from beginning to end, *Fulminante*, 499 U.S. at 309-10 -- still warrant automatic reversal. The violation at issue here simply was not so pervasive that it adversely affected the entire trial from beginning to end making it "structural" in nature. Reversal of four murder convictions for an alleged error that in all likelihood had no impact on the fairness of the

trial at issue is unsupported by precedent since *Perry* and is too high a price for society to pay.

CONCLUSION

The amici states respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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